IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1975

No.75-1058

MITSUI SHINTAKU GINKO K.K., TOYKO,

Petitioner

vs.

JOHN DODGE,

Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,

Respondent

BRIEF OF RESPONDENT JOHN DODGE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RAYMOND J. CONBOY
910 Standard Plaza Bldg.
Portland, Oregon 97204
Attorney for Respondent

POZZI, WILSON & ATCHISON, Of Counsel

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I N T H E S U P R E M E C O U R T

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Respondent John Dodge prays that the Petition for Writ of Certiorari be denied.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Petition for Writ of Certiorari brings to this Court no significant, unresolved issue of federal law, nor is there any conflict among the United States Circuit Courts of Appeal. The petitioner states that the "* * * Petitions in Shellman 1/ and in Dodge raise issues similar to those raised in A/S ARCADIA v. Gulf Insurance Company in which a Petition for a Writ of Certiorari was filed on October 31, 1975 (No. 75-646)." (Petition, p. 5). This Court denied certiorari in The ARCADIA on January 12, 1976. 44 US Law Week 3398.

The 1972 Amendments to the Longshoremens' and Harbor Workers' Compensation Act,

1/ Shellman v. United States Lines, No. 75-3058.

Public Law 92-576, 86 Stat 1251, struck a balance between the competing claims of harbor workers, shipowners and master stevedores. The Amendments: (1) increased harbor workers' compensation benefits and extended benefits to certain workmen injured on docks, piers and adjoining areas; (2) eliminated the right of a harbor worker to recover against a vessel owner for unseaworthiness while preserving traditional third party maritime remedies based upon negligence; and (3) barred the vessel owner from obtaining indemnity or contribution from the stevedore for any third party recovery made by the harbor worker against the vessel owner. 33 USC §§903, 905, 908, 921. Congress made no change in the long-standing rule that a harbor worker's employer was entitled to

be reimbursed out of the employee's third party recovery for payments made by the employer under the Longshoremen's and Harbor Workers' Compensation Act, whether or not those payments were made pursuant to the entry of a formal award of compensation. The AETNA, 138 F2d 37 (CA3, 1943); Allen v. Texaco, Inc., 510 F2d 977, 979-80 (CA5, 1975); 33 USC §933.

Moreover, Congress enacted the 1972 Amendments against a backdrop of decisions by this Court holding that the Court would not fashion a common law rule of contribution to permit a vessel owner to recover part of its loss from an injured harbor worker's employer where the negligence of the employer and vessel owner both contributed to the injury. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corporation,

342 US 282 (1952). In Pope & Talbot Inc. v. Hawn, 346 US 406 (1953), the Court rejected the very contention which Petitioner makes here. In Hawn, a vessel owner contended that the judgment against it in favor of an injured harbor worker should be reduced by the sums which the harbor worker's employer had paid under the Harbor Workers' Act, because the employer's negligence contributed to the plaintiff's injuries. The Court rejected the vessel owner's contention, pointing out that the Harbor Workers' Act:

> "* * * has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injury. Pope & Talbot's contention if accepted would frustrate this purpose to protect employers who are subject to absolute liability by the Act. Moreover, reduction of Pope & Talbot's

> liability at the expense of Hawn [the employer] would be the substantial equivalent of contribution which we declined to require in the Halcyon case."

Halcyon has recently been reaffirmed by this Court in Cooper Stevedoring Co. v. Kopke, 417 US 106 (1974).

The 1972 Amendments not only preserve this Court's rulings in Halcyon and Hawn, but legislatively overrule Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation, 350 US 124 (1956), which held that vessel owners were entitled to indemnity from master stevedores for third party recoveries obtained by harbor workers if the conduct of the stevedores rendered the vessel unseaworthy. Section 5 of the Act, as amended, (33 USC §905(b)) provides:

> "In the event of injury to a person covered under this Act caused by the negligence of

> a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.
> * * * "

The legislative history makes it clear that Congress intended to overrule Ryan. The Report of the Senate Committee on Labor and Public Welfare accompanying the 1972 Amendments states (U. S. Senate, 92d Cong., 2d Sess., No. 92-1125, p. 11):

> "The Committee also believes that the doctrine of the Ryan case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer

to be absolute, as it is essentially under the seaworthiness doctrine. * * * Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort."

The legislative history further contemplated that a harbor worker could recover damages for the concurrent negligence of the vessel owner and the harbor worker's employer. Thus, the Report of the Senate Committee on Labor and Public Welfare states (op cit, p. 10):

> "Permitting actions against the vessel based on negligence will

meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to section 5 would still permit an action against the vessel for negligence. To recover he must establish: (1) the vessel put the foreign substance on the deck, or knew that it was there, and wilfully or negligently failed to remove it; or (2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. * * *" (Emphasis added).

Accordingly, Congress contemplated recovery against the vessel owner in cases of concurrent fault, the kind of fault

which is endemic to injuries aboard docked vessels, where there normally is commingling of employees of two or more employers, as Halcyon, Hawn and Ryan all bear witness.

The shipowning interests have simply refused to acquiesce in the will of Congress, urging the courts (vainly so far) to put them in a better position than the 1972 Amendments permit. Every collegiate court which has been called upon to decide the issue has rejected the Petitioner's contentions. Landon v. Leif Hoegh Co., Inc., 521 F2d 756 (CA2, June 18, 1975), certiorari denied sub nom. A/S ARCADIA v. Gulf Insurance Co., 44 US Law Week 3398 (January 12, 1976); Lucas v. "Brinknes" Schiffahrts Ges, 379 F Supp 759 (E.D., Pa. 1974) (before Lord, C.J., and Luongo

and Huyett, J.J.); Dodge v. Mitsui Shintaku Ginko, --- F2d ---(CA9, November 21, 1975); Shellman v. United States Lines, --- F2d --- (CA9, November 21, 1975).

Contrary to the suggestion of the Petitioner, there is no conflict between the above cases and Murray v. United States, 405 F2d 1361 (DC Cir., 1968). Murray arose before the 1972 Amendments to the Harbor Workers' Act and involved, not that Act, but the Federal Employees' Compensation Act, 5 USC §§8131, 8132. Murray stated, by way of dictum,2/that an employee injured through the concurrent negligence of the United States and a third party could recover only half of his damages from the third party, since he was drawing benefits

2/ Murray was cited with approval in Dawson v. Contractors Transport Corp., 467 F2d 727 (DC Cir., 1972), again by way of dictum.

from the United States under the Federal Employees' Compensation Act. Murray relied upon a rule peculiar to the District of Columbia, first announced in Martello v. Hawley, 112 US App DC 129, 300 F2d 721 (1962) that "* * * where one joint tortfeasor causing injury compromises the claim, the other tortfeasor, although unable to obtain contribution because the settling tortfeasor had 'bought his peace', is nonetheless protected by having his tort judgment reduced by one-half, on the theory that one-half of the claim was sold by the victim when he executed the settlement." (405 F2d at 1365). The Martello rule is peculiar to the District of Columbia, and the dictum of Murray shares the vice of most obiter: formulated without the benefit of argument, the decision

failed to consider that the United States has lien rights in any third party judgment obtained under the Federal Employees' Compensation Act. 5 USC §8132. In any event, Murray relied upon a substantive rule peculiar to the District of Columbia, involved the Federal Employees' Compensation Act rather than the Harbor Workers' Act, and predated the 1972 Amendments to the Harbor Workers' Act.

Neither is the decision below at odds with Griffith v. Wheeling Pittsburg Steel Corp., 521 F2d 37 (CA3, 1975), contrary to the suggestion of Pacific Merchant Shipping Association, which has asked this Court for leave to file an amicus brief in support of Mitsui's Petition. Griffith involved the question whether Section 5 of the Harbor Workers' Act, as amended,

preserves the rule of Reed v. SS YAKA, 373 US 410 (1963). Reed had held that a longshoreman was not precluded by the exclusive remedy provisions of the Act from bringing a third party action against a vessel which did its own stevedoring. Griffith determined, properly, that the intent of Congress in amending Section 5 was to preserve the rule of Reed v. YAKA to a limited extent. That question has nothing to do with the issue in this case.

Petitioner contends that this Court is free to "* * * fashion a fair remedy for a longshoreman injury caused by joint shipowner/stevedore negligence." (Petition, p. 2). The remedy proposed by the vessel owner would "impose unjustified burdens upon the injured longshoreman" as the court below pointed out (Petition, A-6). For

every case in which a negligent master stevedore recovers its compensation lien out of a third party recovery, there will be many other cases where the stevedore is compelled to pay compensation benefits for injury caused by a vessel which cannot be recovered in a third party action because of the extraordinary difficulty of proving a negligence action against an itinerant vessel manned by foreign crews.

The mandate of Congress embodied in the 1972 Amendments is not obscure. Shipowners do not like third party actions. Their views concerning the undesirability of such actions are frankly set out in the amicus motion and brief of Pacific Merchant Shipping Association, but are not the views of Congress as embodied in the 1972 Amendments to the Harbor Workers' Act, and have

necessarily been rejected by every appellate court which has considered them. The contentions raised by the Petition were before this Court in A/S ARCADIA v. Gulf Insurance Co., No. 75-646, cert. denied January 12, 1976, and there have been no fresh developments in the Circuit Courts of Appeal which would justify a grant of certiorari in this case to consider issues which the Court declined to review in The ARCADIA.

CONCLUSION

For the reasons above set forth, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RAYMOND J. CONBOY
910 Standard Plaza Bldg.
Portland, Oregon 97204
Attorney for Respondent
John Dodge

POZZI, WILSON & ATCHISON
Of Counsel